STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS LEE PAYNE,

Defendant-Appellant.

UNPUBLISHED
February 24, 2005

No. 248708
Antrim Circuit Court
LC No. 02-003617-FH

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. This case involves the shooting death of defendant's wife. We affirm.

Defendant's sole argument on appeal is that he is entitled to a new trial because he was denied his right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. While defendant moved for a new trial on the basis of ineffective assistance of counsel, the trial court denied the motion without oral argument, on the basis that "[d]efendant ha[d] not proved that trial counsel's performance was both deficient and prejudicial." Therefore, absent an evidentiary hearing, "our review of the relevant facts is limited to mistakes apparent on the record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id*. "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id*. at 663-664. "The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy," and "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant first argues that he was denied the effective assistance of counsel because his defense attorney failed to object when the trial court determined that an instruction on voluntary manslaughter was not supported by a rational view of the evidence. We disagree. By expressly approving the jury instructions, defendant waived the issue whether the instructions were erroneous. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Nevertheless, we analyze the propriety of the instructions to determine whether defense counsel's approval of them constituted deficient representation.

According to defendant, a voluntary manslaughter instruction was supported by evidence that indicated that he shot the victim in the heat of passion. "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). Although provocation is not an element of voluntary manslaughter, provocation is the circumstance that negates the presence of malice, which is a requisite element of murder. *Id*. at 533-536, 540. When a defendant is charged with murder, an instruction for voluntary manslaughter must be given if supported by a rational view of the evidence. *Id*. at 541. However, "[t]he role of defense counsel is to choose the best defense for the defendant under the circumstances." *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). And in light of defendant's testimony that the shooting was accidental, we conclude that defense counsel made a sound strategic decision to acquiesce in the trial court's decision to not instruct the jury on voluntary manslaughter. If defense counsel had insisted on the voluntary manslaughter instruction, the instruction would have contradicted defendant's trial testimony that the discharge was accidental. While there was some evidence that defendant and the victim had been arguing before she was shot, given defendant's trial testimony, defense counsel decided to pursue a theory of accidental discharge. Defense counsel's decision concerning what defense theory to present is presumed to be a sound strategic decision that we will not second-guess on appeal.

Defendant next argues that defense counsel was ineffective by allowing introduction of prejudicial MRE 404(b) evidence. We disagree. According to defendant, evidence of an altercation he had with his first wife did not fall within an exception to MRE 404(b) because the prior act did not demonstrate proof of motive, intent, scheme, or plan. Further, defendant argues that the prior act did not support a finding that the shooting was not an accident because he never claimed the incident with his first wife was an accident.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Certain factors must be met for other acts evidence to be admissible. First, a party must offer it to prove "something other than a character to conduct theory." *People v Vandervliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994); *People v Smith*,

243 Mich App 657, 669-670; 625 NW2d 46 (2000). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b). *Vandervliet*, *supra* at 74; *Smith*, *supra* at 670. Third, under the balancing test provided by MRE 403, the evidence must be more probative of an issue at trial than substantially unfair to the defendant. *Vandervliet*, *supra* at 74-75. Fourth, a party may request a limiting instruction under MRE 105 if the trial court decides to admit the challenged evidence. *Id*. at 75.

"[T]he prosecution bears the initial burden of establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b)." *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Id*. at 387. "Where the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded." *Id*. at 385.

Here, the evidence of prior domestic violence between defendant and his first wife was admissible to show that defendant had previously committed violence against a spouse and then blamed his violent behavior on that spouse. In the first incident, defendant claimed that his first wife threatened him with a knife. Similarly, in the present case, defendant claimed that the victim threatened him with a gun, resulting in its unintentional discharge. Because the evidence was admissible, defense counsel's decision not to object to presentation of the testimony did not deprive defendant of the effective assistance of counsel. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002).

Defendant next argues that defense counsel was ineffective for failing to call an expert witness whose testimony would have supported his accidental discharge theory. We note that contrary to defendant's argument, defense counsel did not fail to call the expert to the stand. Rather, defense counsel was precluded from calling the witness by the trial court's decision to exclude the expert's testimony on the ground that it lacked scientific reliability. Defendant contends that the trial court erred in excluding the expert's testimony, and that defense counsel was deficient by failing to object to the trial court's decision to exclude the witness' testimony on that ground. We disagree.

The qualification of a witness as an expert, and the admissibility of his testimony, are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Phillips*, 246 Mich App 201, 203; 632 NW2d 154 (2001), aff'd 468 Mich 583; 663 NW2d 463 (2003). An abuse of discretion will only be found "if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Here, the trial court permitted defense counsel to present the testimony of his expert witness at an in camera hearing. After hearing the proposed testimony, the trial court concluded that the expert's testing methods were not reliable because they were based on inaccurate measurements and incomplete information, e.g., the amount of force that was exerted on the weapon when it was allegedly dropped, and whether the weapon was even capable of being fired, either by intentionally pulling the trigger or by dropping it. Therefore, we cannot conclude that the trial court abused its discretion in excluding the testimony when it was based on speculation and unreliable data. And because defense counsel is not ineffective for failing to further pursue what would have amounted to a futile objection, defendant is not entitled to relief on this issue. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Additionally, defendant argues that defense counsel was ineffective for failing to object to the exclusion of the expert's testimony on the alternative ground that exclusion was not warranted as a sanction for failing to timely disclose the substance of the expert's proposed testimony. However, as noted above, the trial court properly excluded the expert testimony on the ground that it was based on speculation and unreliable data, and defense counsel is not ineffective for failing to make a futile objection. *Id*.

Finally, defendant argues that defense counsel was ineffective by failing to implement a trial strategy. According to defendant, defense counsel's failing is evidenced by his failure to articulate a theory of defense in opening and closing arguments and his presentation of multiple versions of the events without clarifying inconsistencies. We disagree. "Every criminal defense attorney must make strategic and tactical decisions that affect the defense undertaken at trial." *Pickens*, *supra* at 324. Although defense counsel's opening and closing statements during trial were unfocused, the course of trial revealed that defense counsel's intended trial strategy was to argue that the gun accidentally discharged. That defense counsel's trial strategy was unsuccessful does not constitute ineffective assistance of counsel. *Stewart*, *supra* at 42.

We affirm.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra